BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBERT D. NORRIS Claimant	)	
VS.	)	
GEAR FOR SPORT, INC. Respondent	)	Docket No. 1,025,774
AND	)	
LIBERTY MUTUAL FIRE INS. CO. Insurance Carrier	)	

ORDER

Respondent requested review of the January 4, 2007 Award by Administrative Law Judge (ALJ) Robert H. Foerschler. The Board heard oral argument on April 4, 2007.

APPEARANCES

James E. Martin, of Overland Park, Kansas, appeared for the claimant. Andrew D. Wimmer, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, at oral argument, the parties took no issue with the ALJ's finding that claimant sustained a 69 percent task loss as a result of his accident.

ISSUES

The ALJ awarded claimant a 47 percent work disability as a result of his May 31, 2005 work-related accident.[1] Respondent requested review of the ALJ's Award exclusively on the issue of the nature and extent of claimant's impairment. Respondent specifically takes issue with claimant's alleged entitlement to work disability and his alleged lack of good faith retention of his job with respondent in failing to take a requested drug test. And because respondent's representative testified that the claimant's restrictions could be accommodated had he not been terminated for his failure to participate in the requested drug screening, respondent maintains claimant's recovery is limited to his functional impairment.

Claimant contends the evidence establishes that he acted in good faith in connection with his attempts to retain his job with respondent and as such, the Award should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

There is no dispute that claimant sustained a work-related injury on May 31, 2005 and that claimant suffered a low back and a hernia injury in the accident. The hernia was surgically resolved but claimant sustained a herniated disk at the L5-S1 level which ultimately required surgery on August 30, 2005 under the direction of Dr. Jeffrey MacMillan.

While claimant was off work following surgery, respondent contacted claimant on September 29, 2005 about taking a random drug test. The basis for this request relates to the terms upon which claimant had been rehired. Claimant formerly worked for this respondent and following a drug screen performed in connection with an injury, claimant's employment was terminated. Based upon claimant's testimony, it appears that this earlier claimant's drug screen revealed medication. And claimant testified that the medication revealed in the drug screen was prescribed. Nonetheless, claimant was terminated for a positive drug screen.

After a period of time, respondent contacted claimant again and offered re-employment. The parties agreed that claimant would willingly submit to 3 random drug

[1] It is unclear from the Award precisely how the ALJ concluded claimant sustained a 47 percent work disability. He found claimant bore a 69 percent task loss and that "his earning capability has also been reduced, by a similar reasonable figure". Thus, based upon simple mathematics, it is likely that the ALJ found a 25 percent wage loss.

screens upon respondent's request. Claimant was asked to and he took a pre-employment drug test. He then and commenced his employment as a maintenance technician, where he worked up until May 31, 2005, the date of his injury.

Following claimant's injury and subsequent back surgery, he was taken off work and given medications to help with his recovery and post-surgery pain. As of September 29, 2005 claimant was not yet released to return to work or to drive and was still taking prescription medications, including Flexeril and Vicodin. He testified he was contacted by phone at home in Missouri, probably in the afternoon, on September 29, 2005 by Natalie Vesci about taking a drug screen. At all earlier times, any drug screens took place in Lenexa, Kansas. Claimant was not told where this most recent test would take place, but he believed the drug screen he was being asked to take would occur in that location. He advised respondent's representative that he would have to find someone to take him to the lab. After some searching, claimant was unable to find a ride. He contacted respondent's office and indicated he could not get a ride that day. He informed the representative that he was going out of town on the 30th and would contact respondent the following Monday about taking the test.

Claimant testified that at no time did Natalie Vesci or any other representative tell him on September 29, 2005 that they would provide a driver for him, nor did they indicate that the drug screen would take place at a location closer to his home.

Conversely, Janet Fulgrum, the Vice President in charge of Human Resources, testified that she directed Natalie Vesci to contact claimant about a random drug test. According to Ms. Fulgrum, Ms. Vesci first called claimant at 9:30 a.m. on September 29, 2005. She was unable to reach claimant and left a voice message. Then, Ms. Fulgrum believes Ms. Vesci called again at noon, again leaving a message. Ms. Fulgrum also testified that it was her belief Ms. Vesci offered claimant a ride to the drug screen.

When Ms. Vesci learned from claimant that he was unable to appear on the 29th, Ms. Fulgrum testified that it was her understanding Ms. Vesci again called claimant 2 times on September 30th. Then, Ms. Fulgrum called claimant's number herself and left a message directing claimant to contact either herself or Ms. Vesci so that the drug screen could be scheduled on the 30th.[2]

Claimant returned the call to Ms. Fulgrum and explained that he was out of town and would contact her on the following Monday to schedule the test. When claimant contacted Ms. Fulgrum on Monday, he was advised that he was fired for failing to report for the drug screen as requested.

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[2] R.H. Trans. at 50-51.

Thereafter, claimant continued his recuperation and on December 14, 2005 he was released to return to sedentary work. On February 6, 2006, claimant was released to medium work activities. When claimant was released he contacted respondent about returning to work and was told that he was no longer in their employ. Nonetheless, Ms. Fulgrum testified that had claimant not been fired, he would have been returned to work at his normal work duties, but others would be allowed to help him so that his restrictions would be accommodated.

Following claimant's termination and subsequent full release to return to work, claimant found employment with several different companies. Each of those employments was lighter in nature than what he had been doing for respondent. As a welder he earned $13 per hour and as a clean up worker/plumber he earned $12 per hour, both without much if any overtime and no fringe benefits. Most recently he was hired by a temporary agency earning $15 per hour, again with no overtime or fringe benefits. At oral argument claimant's attorney requested that the Board should affirm the ALJ's 25 percent actual wage loss finding.

According to Mr. Dreiling, if claimant is compelled to follow the restrictions set forth by Dr. Prostic, he could expect to earn $8-10 per hour. He also testified that if claimant were to lose the job he presently has, he could expect to earn $10-12 per hour.

Two physicians have expressed opinions as to claimant's functional impairment as a result of his accident. Dr. MacMillan rated claimant at 5 percent permanent partial impairment based upon the *Guides*.[3] According to Dr. MacMillan, claimant's range of motion and his radiating pain and numbness symptoms had improved following the surgery.

Dr. Prostic, who saw claimant on February 10, 2006, rated claimant at 10 percent permanent partial impairment using the DRE methodology set forth in the *Guides.* Alternatively, he testified that using the range of motion model, claimant bears a 29 percent functional impairment. According to Dr. Prostic, claimant does not fit into the DRE model because he had such a poor result from the surgery.[4]

The ALJ failed to make any finding with respect to claimant's functional impairment. After considering the record as a whole, the Board finds that the claimant sustained a 7.5 percent functional impairment as a result of his compensable accident. This is nothing more than an average of the two ratings offered by the physicians based upon the DRE methodology set forth in the *Guides*. And because neither physician is more persuasive

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[3] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

[4] Prostic Depo. at 13-14.

than the other, this approach seems reasonable. Accordingly, claimant's functional impairment is 7.5 percent to the whole body.

Because that impairment represents an injury to a non-scheduled body member, the Board must consider whether the claimant is entitled to a permanent partial general disability in excess of the value of his functional impairment.

K.S.A. 44-510e, in defining permanent partial general disability, states that it shall be:

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.

In determining what, if any, wage loss claimant has suffered, the statute must be read in light of both *Foulk*[5] and *Copeland*.[6] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for the purposes of the wage-loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages, rather than the actual earnings, when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[7]

In this instance, respondent contends that claimant failed to act in good faith by failing to appear for a requested drug screen, which resulted in claimant's termination. Ms. Fulghum testified that respondent offered to make a courier available to claimant to transport him to the testing site in Lenexa. She also testified, somewhat inconsistently, that

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[5] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[6] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[7] *Id*. at 320.

a testing site was provided just 5-6 miles from claimant's home. Claimant says he was never advised of the alternative location, nor of the availability of transportation on September 29, 2005. Rather, he testified that he attempted to get to the appointed place and was unable to arrange transportation. He kept in contact with Ms. Vesci and Ms. Fulghum, a fact they do not deny.

The difficulty with respondent's evidence is that most all the facts testified to by Ms. Fulghum represent acts or statements made by Ms. Vesci, not Ms. Fulghum. Although Ms. Fulghum may have expected Ms. Vesci to tell claimant certain things about the location of the test and the availability of transportation, she was not present when the phone calls were made. She does not, in fact, know what Ms. Vesci told claimant and Ms. Vesci did not testify. Aside from this unsubstantiated hearsay, what we are left with is claimant's otherwise uncontroverted testimony that he was unable to get to the Lenexa location for the drug screen in spite of his efforts to find transportation. He advised Ms. Fulghum of this difficulty and told her he would contact her the following Monday. And he did precisely that, only to find that he was terminated.

The test of whether a termination disqualifies an injured worker from entitlement to a work disability is a good faith test on the part of both the claimant and the respondent.[8] The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis.[9] In this instance, claimant was terminated for failing to appear for a random drug screen. But under these circumstances, the Board finds that claimant exhibited good faith in attempting to retain his employment. He returned respondent's phone calls and attempted to find transportation to the drug testing facility. Claimant was not released to drive at this point and so his transportation difficulties are understandable, particularly given the distance between his home and the testing facility. He had already planned to go out of town with his wife on the 30th and the Board finds no lack of genuineness in that fact. Although respondent adamantly suggests that transportation was made available on the 29th, the Board is not so persuaded. Claimant denies such offer and if one had been made, there is no explanation within the record that would explain why claimant would reject such an offer, particularly on the 29th. The Board, therefore, finds claimant exhibited no lack of good faith in connection with his failure to appear for a drug screen on September 29 or 30, 2005.

Given this factual finding, claimant's wage loss is based upon his actual wages, which are presently $15 per hour. That hourly wage, based upon a 40 hour work week, translates to a 25 percent wage loss. And when averaged with the 69 percent task loss, the result is a 47 percent work disability as found by the ALJ. Accordingly, the ALJ's Award is hereby affirmed in all respects.

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[8] *Helmstetter v. Midwest Grain Products, Inc.*, 29 Kan. App. 2d 278, 28 P.3d 398 (2001).

[9] *Parsons v. Seaboard Farms, Inc.*, 27 Kan. App. 2d 843, 9 P.3d 591 (2000).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated January 4, 2007, is affirmed

IT IS SO ORDERED.

Dated this _____ day of April, 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James E. Martin, Attorney for Claimant
Andrew D. Wimmer, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge